No. 95-83

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995.

ALAN MEGHRIG AND MARGARET MEGHRIG,
Petitioners,

v.

KFC WESTERN, INC.,
Respondent.

ON WRIT OF CERIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE
Massachusetts, Missouri, Alaska, Florida, Guam, Kansas, Kentucky, Louisiana, Nevada, New Jersey, New Mexico, New York, West Virginia, and Wisconsin

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Massachusetts, Missouri, Florida, Guam, Kansas,
Kentucky, Louisiana, Nevada, New Jersey, New Mexico,
New York, West Virginia, and Wisconsin

Interest of Amici Curiae

The primary interest of the amici states[1] in this case is the preservation of the ability of federal courts sitting in equity to devise appropriate remedies in environmental matters. It is an ancient maxim of this Court that "[t]he great principles of equity, securing complete justice, should not yield to light

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[1]The states participating in this brief as amici curiae are: Florida, Guam, Kansas, Kentucky, Massachusetts, Missouri, Nevada, New Jersey, New Mexico, New York, West Virginia and Wisconsin.

inferences, or doubtful construction." *Brown v. Swann*, 35 U.S. 497, 503 (1836).

The ability of the states and their citizens to "secure complete justice" in environmental matters is dependent in part upon the ability of the federal judiciary to administer the federal environmental laws in a flexible manner. Where the environmental laws grant the courts their full equitable powers in order to "protect the public health, the environment, and public water supplies from the pernicious effects of toxic wastes[,] . . . [c]ourts should not undermine the will of Congress by either withholding relief or granting it grudgingly." *United States v. Price*, 688 F.2d 204, 214 (3d Cir. 1982). The States, as the primary governmental guardians of the public health and welfare, have a great interest in preserving for themselves and for their citizens the judicial tools needed to perform that mission.

Accordingly, the amici urge this Court to affirm the decision of the Ninth Circuit Court of Appeals and to re-affirm the principle that where the federal district courts sit in equity and the public interest is at stake, the courts have the power "to do equity and to mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944); *see also Porter v. Warner Holding Co.*, 328 U.S. 395, 397 (1946).

This aim can be achieved by holding that the Citizens' Suit provision of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6987, enables courts to award restitution to plaintiffs in appropriate circumstances.

Such a decision is of particular interest to states which lack a statute that enables states[2] or private parties to recover the costs of responding to petroleum contamination which has produced a hazardous condition, since it is established that this provision applies to petroleum spills which endanger the public. In addition, interpreting this provision in such a fashion will in most circumstances provide the only means for the states and their citizens to recover from the federal government the costs of cleaning up petroleum contamination, where the federal government is responible for a release of petroleum that has created a hazardous condition.

Summary of Argument

The issue before the Court is the power of the district courts to award restitution to a party who has expended funds responding to conditions which may present an "imminent and substantial endangerment to health or the environment," pursuant to Section 7002[3] of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6987 (1988 & Supp. 1993). In holding that restitution is available under Section 7002, the Ninth Circuit relied upon decisions of federal courts recognizing that restitution is available to the federal government when it sues under a similar provision of RCRA, as well as the strong policy reasons for permitting citizens to

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[2]As this Court has recognized, a State is a "person" which may maintain an action under Section 7002. *See Department of Energy v. Ohio*, 503 U.S. 607 (1989).

[3]Section 7002 is codified at 42 U.S.C. § 6972.

sue for restitution under Section 7002. *See KFC Western, Inc. v. Meghrig*, 49 F.3d 518, 521-24 (9th Cir. 1995). This Court should affirm the decision for the reasons stated by the Ninth Circuit. More fundamentally, the decision should be affirmed under the precedents of this Court holding that where Congress has invoked the courts' equitable powers, courts may in their discretion exercise the full range of those powers. The decision below is a proper expression of the inherent equitable powers of the federal district courts to award restitution to citizens who have expended funds in response to conditions which may present an imminent and substantial endangerment to health or the environment.

The "imminent and substantial endangerment" provisions of RCRA, Sections 7002 and 7003, empower citizens and the federal government, respectively, to bring suit in federal court against "any person" who "has contributed to or who is contributing to" the "past or present" "handling, storage, treatment, transportation or disposal of any solid or hazardous waste," which "may present an imminent and substantial endangerment to health or the environment." *See* 42 U.S.C. § 6972(a)(1)(B); 42 U.S.C. § 6973(a).

Sections 7002 and 7003, which are essentially codifications of the common law of public nuisance, confer upon the courts equitable jurisdiction. Once it is determined that Congress intends that courts have equitable jurisdiction over a matter, the "full scope of that jurisdiction is to be recognized and applied," unless a statute restricts that jurisdiction. *Porter*, 328 U.S. at 398. Neither Section 7002 nor Section 7003 restricts the ability of the district courts to invoke their full equitable powers; rather, the language of both Sections gives courts wide latitude in fashioning appropriate remedies. Because the award of

restitution is a remedy that has traditionally been within the equitable powers of courts to award, both Sections 7002 and 7003 must be construed as permitting courts to award restitution to citizens or to the federal government when either has expended funds in responding to conditions which may present an "imminent and substantial endangerment to health or the environment." Construing the statute in such a fashion is consistent with the principles of statutory construction and furthers the purpose that Congress intended for the Citizens Suit provision of RCRA.

In addition, a court may award restitution under either Section even where the condition which may present an imminent and substantial endangerment to health of the environment has been successfully abated prior to the commencement of the action. Under established precedent of this Court, where statutes confer upon courts the authority to award both prospective (i.e., injunctive) relief and other appropriate equitable relief, the fact that the need for an injunction has ceased prior to the filing of the lawsuit does not deprive the courts of their power to award other equitable relief, such as restitution. Denying the award of restitution to a citizen or to the federal government where they have taken steps to prevent harm to the public health or the environment in advance of litigation would frustrate the intent of Congress in enacting these provisions.

Argument

I. SECTION 7002 OF RCRA CONFERS UPON THE COURTS FULL EQUITABLE JURISDICTION, INCLUDING THE POWER TO AWARD RESTITUTION.

A. *Where Congress Has Conferred Equitable Jurisdiction Over a Matter, It Is Presumed To Have Conferred The Ability To Award All Traditional Equitable Remedies.*

It is axiomatic that "the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Section 7002 of RCRA empowers the district courts to "restrain any person who has contributed to or is contributing to" activity "which may present an imminent and substantial endangerment to health or the environment;" and to order any person who has contributed to or is contributing to activity which may present an imminent and substantial endangerment to health or the environment to "take such other action as may be necessary." 42 U.S.C. § 6972(a). This grant of authority unquestionably confers upon the courts equitable jurisdiction.[4]

[4]The Eighth Circuit, in *Furrer v. Brown*, 62 F.3d 1092 (8th Cir. 1995), ignored this plain grant of equitable jurisdiction by proceeding to analyze Section 7002 under the test set forth by this Court in *Cort v. Ash*, 422 U.S. 66 (1975). *See* 62 F.3d at 1094-97. The issue before this Court is not whether Section 7002 creates an implied private right of action for monetary damages, as the Eighth Circuit in *Furrer* seemed to believe,

See Hecht Co. v. Bowles, 321 U.S. at 329 (statute which empowers court to issue injunctions confers equitable jurisdiction).

Once it is established that a statute confers equitable jurisdiction upon the courts, the next question to be resolved is whether the statutory provision in question evinces an intent on the part of Congress to limit the equitable powers of the district courts in awarding relief in such matters. *Porter*, 328 U.S. at 397. A grant of equitable jurisdiction is presumed to provide the court with full equitable jurisdiction, and "since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Id.* (citation omitted).

In *Porter*, the Court held that the Emergency Price Control Act, in authorizing the district court to enter "a permanent or temporary injunction, restraining order, or other order," grants full equitable jurisdiction, reasoning that "the term 'other order' contemplates a remedy other than that of an injunction or restraining order, a remedy entered in the exercise of the District Court's equitable discretion." *Id.* at 399; *see also Hecht Co. v. Bowles*, 321 U.S. at 328 (term "other order" contemplates equitable relief other than injunction or restraining order).[5] Subsequent decisions of this Court have remained

and as Petitioners argue. *Id.*; *see* Pet. Br. at 18-41. Rather, since Section 7002 plainly provides a means for citizens to invoke the courts' equitable jurisdiction, the issue is the scope of the district courts' equitable powers in fashioning remedies under that section.

[5]As this Court subsequently noted with regard to the *Porter* decision, the Court in that case found broad equity powers conferred under the

faithful to the principles set forth in *Porter*, and have consistently applied a broad interpretation to statutes that grant to courts equitable jurisdiction "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity . . ." *Porter*, 325 U.S. at 398; *see, e.g., California v. American Stores Co.*, 495 U.S. 271, 295 (1990)(§ 16 of the Clayton Act permits courts to order divestiture; applying *Porter*); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979)(§ 215 of the Investment Advisers Act of 1940 granted to courts equitable jurisdiction and therefore power to award restitution); *Mitchell v. Robert De Mario Jewelry*, 361 U.S. 288, 296 (1960)(courts have equitable jurisdiction under § 15(a)(3) of the Fair Labor Standards Act to order an employer to reimburse employees for wages lost due to an unlawful discharge).

Emergency Price Control Act, "not only because of the 'other order' language, but because of the 'traditional equity powers of a court.'" *Renegotiation Board v. Bannercraft Co.*, 415 U.S. 1, 19 (1974)(quoting *Porter*, 328 U.S. at 400).

B. *Section 7002 Confers Upon the Courts Full Equitable Jurisdiction, Including the Power to Award Restitution.*

1. The Power Granted to Courts Under Section 7002 is Identical to the Power Granted to Courts Under Section 7003.

The Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992, (1988), contains two parallel provisions that address the power of courts to respond to conditions which may present an "imminent and substantial endangerment to health or the environment." See § 7002, 42 U.S.C. § 6972(a)(1)(B)(authorizing relief when "any person" alleges conditions of threatened or actual imminent and substantial endangerment); § 7003, 42 U.S.C. § 6973 (providing for relief where federal government brings action).

These provisions contain identical language regarding the type and scope of relief available to plaintiffs. In addition to giving courts the power to "restrain" a defendant who has allegedly created a hazardous condition, the statute confers the power to the courts " *to order such person to take such other action as may be necessary. . .*" *See* 42 U.S.C. § 6972()(1)(B); 42 U.S.C. § 6973 (emphasis supplied).[6]

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[6]As is noted by the United States in its brief as amicus curiae, the provisions differ in that Section 7003 also authorizes the federal government to "take other action under this section." *See* U.S. Br. at 21, n. 23. The United States is incorrect when it suggests that Section 7003's express authorization for the *executive* to take action restricts Section 7002's broad invocation of the *judiciary's* equitable powers. *Id.* (arguing that courts have greater latitude in awarding restitution to the United States). Moreover, the United States'

The Ninth Circuit relied upon this phrase for its finding that parties suing under the Citizens' Suit provision in Section 7002(a)(1)(B) are not limited to actions seeking injunctive relief. *See KFC Western*, 49 F.3d at 521. The Ninth Circuit based its construction of that provision primarily upon other courts' interpretations of Section 7003 of RCRA, which addresses the federal government's right to sue to abate conditions which may present imminent and substantial endangerments to health or the environment. *Id.* at 522.[7] The

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position that Section 7003's grant of authority to the Environmental Protection Agency to take action under the section places it on different footing from a private citizen who takes action is misplaced. *Id.* As previously noted, states are "persons" under Section 7002, and obviously are entitled to take appropriate action to protect their citizens; indeed, individual citizens possess the right and the ability to take steps to protect themselves and others from endangerment, independent of any grant from Congress. The United States' effort to construe the express authorization of executive action under Section 7003 as reflecting Congressional intent to limit the scope of the judiciary's equitable authority under Section 7002 is obscure, at best, and is not the type of "clear and valid legislative command" necessary to restrict the courts' equitable jurisdiction. *See Porter*, 328 U.S. at 398.

[7]The Ninth Circuit relied on two Eighth Circuit decisions, *United States v. Aceto Agric. Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989), and *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987), and one Third Circuit case, *United States v. Price*, 688 F.2d 204 (3d Cir. 1982). While the Ninth Circuit's reliance on the Eighth Circuit's cases has been thrown into doubt by that Court's decision in *Furrer v. Brown*, 62 F.3d 1092 (8th Cir. 1995)(stating that the issue of availability of restitution under Section 7003 was never directly ruled upon in prior cases and holding that restitution unavailable under

Ninth Circuit's analysis fully supports the decision.

Sections 7002 and 7003 are parallel provisions, so that the availability of any remedy under one section strongly implies that the remedy is also available under the other. As the Senate Report on the 1984 amendments to RCRA, which added Section 7002(a)(1)(B), states, "[t]hese amendments are intended to allow citizens *exactly the same* broad substantive and procedural claim which is already available to the United States under Section 7003 . . ." S. Rep. No. 284, 98th Cong., 1st Sess. at 56-57 (1983). That report further noted that to the extent these Sections differed, these differences "are not intended to reflect a difference in such claims, but merely to clarify that citizens will have the same claim presently available to the United States." *Id.* Thus, it is pertinent that the United States may sue for restitution under Section 7003. *See United States v. Price*, 688 F.2d 204, 214 (3d Cir. 1982)(authority granted to the courts under section 7003 was "intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risks posed by toxic wastes"). Other courts have recognized the broad grant of equitable jurisdiction contained in Section 7003. *See, e.g., United States v. Valentine*, 856 F.Supp. 627, 633 (D. Wyo. 1994)(contribution is available remedy; "like restitution, contribution is an equitable remedy to prevent unjust enrichment"); *United States v. Conservation Chem. Co.*, 619 F.Supp. 162, 199 (D.C. Mo. 1985)("[t]he Court has broad authority under Section 7003 to grant the equitable relief

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Section 7002), the Third Circuit's decision in *Price* still stands for the proposition that restitution is available under Section 7003. *See Price*, 688 F.2d at 214.

necessary to eliminate the endangerment").

The provisions of Section 7002 that address the power of the courts to enforce that section are basically identical to those in Section 7003. *Compare* 42 U.S.C. § 6972 *with* 42 U.S.C. § 6973(a). Accordingly, as one court has stated, the imminent and substantial endangerment provision in Section 7002 "is designed to provide a private means of obtaining the same relief that the EPA Administrator has previously been authorized to seek under RCRA by 7003." *Middlesex County Bd. of Chosen Freeholders v. New Jersey*, 645 F.Supp. 715, 721 (D.N.J. 1986); *see also Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979)(where statutory language in one act is *in haec verba* with the language of another act, it is appropriate to conclude that Congress intended an identical construction of each term).

This Court's decision in *Porter* is particularly instructive here, given the similarity of the language of Section 205(a) of the Emergency Price Control Act, construed in *Porter*, and the language of Sections 7002 and 7003. The critical language in *Porter* empowers the district courts to effect the purposes of the act through the issuance of "other order[s]." 328 U.S. at 400. Section 7002 of RCRA contains a similarly broad provision, that the court can "order such person to take such other action as may be necessary." 42 U.S.C. § 6972. This provision plainly contemplates that the court can issue orders providing for other than injunctive relief. *Hecht Co.*, 321 U.S. at 328. As in *Porter*, the award of restitution under Section 7002 of RCRA can be viewed as an "equitable adjunct to an injunction

decree," or as "an order appropriate and necessary to enforce compliance with the Act." *Porter*, 328 U.S. at 395.

2. An Order Awarding Restitution is Proper as an "Equitable Adjunct to An Injunction Decree".

The award of restitution to a RCRA citizens suit plaintiff is an appropriate "equitable adjunct to a claim for injunctive relief." *Id.* In such a situation, "where . . . the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the court has the power to . . . award complete relief even though the decree includes that which might be conferred by a court of law." *Id.* Where the court has jurisdiction to "restrain," or enjoin, the person who caused the condition which may present an endangerment to health or the environment, it is fully within that court's equitable jurisdiction to order such a person to pay restitution to a party who has expended funds in responding to the potential endangerment. *Id.* To hold otherwise "would permit the result, extraordinary in our jurisprudence, of a wrongdoer shifting responsibility for his negligence onto his victim." *Wyandotte Trans. Co. v. United States*, 389 U.S. 191, 204 (1967).

3. An Order Awarding Restitution is an "Order Proper and Necessary To Enforce Compliance" With RCRA .

An award of restitution is also warranted under *Porter* because the availability of such relief will foster compliance with the goals of RCRA and, specifically, with Congress' goal to quickly abate conditions which produce or threaten to produce imminent and substantial endangerments to health or

the environment. Congress has stated that "the primary goal" of Section 7002(a)(1)(B) is "the prompt abatement of imminent and substantial endangerments." H.R. Rep. No. 198, 98th Cong., 2d Sess., pt. I, 53 (1983), *reprinted in* 1984 U.S.C.C.A.N. 5612. Allowing a party to be reimbursed for the costs expended in abating the complained-of condition furthers this purpose. This is particularly so given the fact that an action brought pursuant to Section 7002(a)(1)(B) cannot be commenced in certain cases until 90 days after notice has been given to the defendant, the Administrator of the EPA, and the State in which the alleged endangerment may occur. 42 U.S.C. § 6972(b)(2)(A). Allowing restitution for costs expended before or during that 90-day notice period furthers the purpose of the Citizens' Suit Provision in securing the prompt abatement of imminent and substantial endangerments.[8] *See KFC Western*, 49 F.3d at 524 (award of restitution serves purpose of providing prompt response to endangerment); *see also Price*, 688 F.2d at 214 (permitting restitution furthers purpose of RCRA).

[8]The Eighth Circuit in *Furrer* relied in part upon the 90 day notice provisions in finding that only injunctive relief is available under Section 7002. 62 F.3d at 1098. That court failed to note that the notice and delay provisions of the act do not explicitly limit the right of a citizen suing under the act the right to recover costs expended during that period, should the reputed violator fail to take steps to abate the complained of condition. *Id.*

In its report on the 1980[9] amendments to RCRA, the Senate noted that:

> [S]ection 7003 is essentially a codification of common law public nuisance remedies . . . [and] therefore, incorporates the legal theories used for centuries to assess liability for creating a public nuisance . . . and to determine appropriate remedies . . .

S. Rep. No. 172, 96th Cong., 1st Sess., at 5 (1979), *reprinted in* U.S.C.C.A.N. 5019, 5023 (1980); *see also United States v. Price*, 688 F.2d 204, 213 (3d Cir. 1982). Both Section 7002 and Section 7003 were intended by Congress to constitute codifications of the common law of public nuisance, and to enable plaintiffs to receive the same types of relief that were available to plaintiffs in public nuisance suits. As shown below, this relief has traditionally included restitution.

It has long been recognized that restitution is an available remedy in public nuisance cases under the common law. *See* Restatement of Restitution, § 115 (1937); U.S. Br. at 22-28. In the comment to Section 115, it is noted that the "abatement of a serious public nuisance . . . is another situation calling for the [award of restitution]." Comment b, Restatement of

[9]When the Resource Conservation and Recovery Act was passed into law as an amendment to the Solid Waste Disposal Act in 1976, the legislative history of the act contained "no specific mention of section 7003 and no mention of the reasons for its insertion." *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 738 (8th Cir. 1986). "Consequently, courts have typically relied upon the legislative history of the 1980 and 1984 amendments to RCRA . . . in interpreting section 7003." *Valentine*, 856 F.Supp. at 633, n.5.

Restitution, § 115 (1937). Like a claim for restitution for the costs of abating a public nuisance under the common law, a claim for recovery of costs incurred in responding to an actual or threatened endangerment is without question equitable in nature. In such a case, the plaintiff does not seek compensatory damages; rather the plaintiff simply seeks to restore the status quo ante. *See Porter*, 328 U.S. at 402; *see, e.g., Hatco Corp. v. W.R. Grace & Co.*, 59 F.3d 400, 411-12 (3d Cir. 1995) (recovery of response costs under Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") are restitutionary); *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1352 (4th Cir. 1987)(same); *United States v. Northeastern Pharmaceutical and Chemical Co.*, 810 F.2d 726, 749 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) (same). Accordingly, recovery of cleanup costs under Section 7002 is a claim in equity for restitution, and may be awarded by courts in appropriate circumstances.[10]

This Court has recognized the ability of courts to award restitution where the plaintiff has acted to abate a dangerous condition, even where the statute under which the action was brought does not explicitly state that restitution is available. *See Wyandotte*, 389 U.S. at 204 (approving restitution of government's expenses in removing a sunken vessel, even

[10]This Court has repeatedly held that the fact that an order calls for monetary relief in the form of restitution does not transform the claim into one for compensatory damages. *See Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558 (1990)(as distinguished from damages, orders awarding restitution in the form of monetary payments are generally granted to prevent unjust enrichment)".

though statute did not explicitly provide for restitution). Other courts have likewise ordered restitution of the costs of abating a public nuisance. *See, e.g., State v. Schenectady Chem., Inc.*, 103 A.D.2d 33, 479 N.Y.S.2d 1010 (N.Y.App. 1984) (state could receive restitution of costs for abating public nuisance caused by chemical wastes); *Brandon Township v. Jerome Builders, Inc.*, 80 Mich.App. 180, 263 N.W.2d 326 (1977) (town could recover costs of repairing dam as restitution for abating public nuisance).

Because Congress intended that Sections 7002 and 7003 were to constitute codifications of the common law of nuisance, and because restitution is an available remedy under such a cause of action, awarding restitution in appropriate circumstances is "proper and necessary" to enforce compliance with RCRA. *Porter*, 328 U.S. at 400. Furthermore, Congress has expressly provided that restitution is an appropriate means of making whole citizens who have voluntarily undertaken cleanups in a variety of other contexts, as shown above.

II. SECTION 7002 EMPOWERS COURTS TO AWARD RESTITUTION TO CITIZENS WHO, PRIOR TO FILING SUIT, INCUR EXPENSES IN ABATING A CONDITION WHICH MAY PRESENT AN IMMINENT AND SUBSTANTIAL ENDANGERMENT TO HEALTH OR THE ENVIRONMENT.

Petitioners and the United States incorrectly assert that restitution under Section 7002 is unavailable where the complained-of condition no longer presents an imminent and substantial endangerment to health or the environment at the commencement of suit under Section 7002. *See* Brief of

Petitioners ("Pet. Br.") at 13-18, Brief of Amicus Curiae, the United States of America ("U.S. Br.") at 11-21. Such a limitation is inconsistent with the prior decisions of this Court dealing with the award of restitution under statutes conferring equitable jurisdiction, as well as with the purposes of the RCRA Citizens' Suit Provision.

A. *Section 7002 Is Not Limited To Prospective Relief.*

Section 7002(a)(1)(B) covers situations where past or present conduct has created a condition "which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). Petitioners and amicus curiae, the United States, seize upon this language as evidence that the section is addressed only to prospective relief where the endangerment remains imminent and substantial at the moment suit is filed. Pet. Br. at 13-18; U.S. Br. at 11-21. In fact, the endangerment provision is not intended to provide a temporal limitation,[11] but to limit the application of Sections 7002 and 7003 to cases where there is great potential for harm if action is not taken. *See United States v. Reilly Tar & Chemical Corp.*, 546 F.Supp. 1100, 1109-10 (D.Minn. 1982);

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[11]As the Fourth Circuit has stated:

> Such grammatical niceties as tense may be useful in arriving at a narrowly sculpted meaning, but they are of little help in interpreting remedial statutes in which actions such as "may be necessary" are contemplated in order to abate gross dangers to a community.

United States v. Waste Industries, 734 F.2d 159 (4th Cir. 1984).

see also United States v. Aceto Agr. Chemicals Corp., 872 F.2d 1373, 1383 (8th Cir. 1989) ("RCRA's 'imminent and substantial endangerment' language does not require EPA to file and prosecute its RCRA action *while* the endangerment exists") (emphasis in the original).[12]

Petitioners and the United States rely principally on this Court's decision in *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987), to support their argument that the court lacks the power to award restitution under Section 7002 where the plaintiff has removed the potential hazard to health or the environment prior to suit. *See* Pet. Br. at 13-22; U.S. Br. at 11, 14. That argument pays insufficient regard to the substantial differences between the Citizens Suit provision of the Clean Water Act addressed in *Gwaltney* and the imminent and substantial endangerment section of the RCRA Citizens Suit provision.

The citizens suit provision at issue in *Gwaltney* is typical of the citizens suit provisions in many other environmental statutes. These provisions only authorize suit against a defendant alleged to be "in violation" of the law. *See, e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2619; Safe Drinking Water Act, 42 U.S.C. § 300j-8; CERCLA, 42 U.S.C. § 9659. Indeed, the citizen suit provision contained in Section 7002(a)(1)(A) of RCRA--not at issue in this case--is very

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[12]While the Eighth Circuit stated in *Furrer* that the subject of the availability of restitution under Section 7003 was not decided in *Aceto*, it did not repudiate that portion of its opinion stating that the abatement of the condition prior to filing did not serve to divest the courts of jurisdiction over the matter. *See Furrer*, 62 F.3d at 1101.

similar to the provision construed in *Gwaltney*, as it addresses only ongoing violations of law. See 42 U.S.C. § 6972(a)(1)(A).

Moreover, typical citizens suit provisions do not contain broad language explicitly authorizing the courts to issue "other orders," or to order defendants to "take such other action as may be necessary" to achieve the aims of the act. *See, e.g.*, *Porter*, 328 U.S. at 399. Typical provisions, then, arguably limit the equitable jurisdiction of the courts, and empower them only to order injunctive relief or to assess penalties.

In contrast, Section 7002(a)(1)(B) of RCRA provides unique authority for citizens to sue in cases of actual or threatened endangerment. The section plainly addresses wholly past conduct, as it permits actions against "any person" including "any past" "generator," "transporter," or "owner or operator" of a "treatment, storage or disposal facility," who "has contributed to" the past "handling, storage, treatment, transportation, or disposal" of waste. 42 U.S.C. § 6972(a)(1)(B). This unique citizens suit provision also broadly authorizes the court to order "such other action as may be necessary" to redress the harm. 42 U.S.C. § 6972. The differences between Section 7002(a)(1)(B) and typical citizens suit provisions reflects the very different purposes of that Section, as it represents the codification of the common law of public nuisance, while typical citizens suit provisions create a purely statutory cause of action addressed only towards enforcing compliance with a specific statute. *See supra*, p. 19.

In light of the different objectives of Section 7002(a)(1)(B) and typical citizens suit provisions, the analysis in *Gwaltney* is inapplicable. The question is not whether an action properly lies under Section 7002 where the *conduct* of the defendant is

wholly in the past, as it was in *Gwaltney*; it plainly does. 42 U.S.C. § 6972. Rather, the question is whether an action lies under Section 7002 where the *effects* of that conduct have been abated by the plaintiff prior to the filing of suit, reducing or eliminating the need for an injunction. Such an action plainly lies. *See United States v. Moore*, 340 U.S. 616, 620 (1951).

In *Moore*, this Court was once again called upon to determine, as it had in *Porter*, the equitable jurisdiction of the district courts in enforcing the provisions of the Emergency Price Control Act, 50 U.S.C. App. § 925(a). The defendant argued that because the rent restrictions imposed by the Act had been lifted prior to the filing of suit, removing the authority (and the need) of the district courts to issue injunctions requiring landlords to charge the statutory rents, the courts likewise lacked jurisdiction to award restitution of overcharges. 340 U.S. at 618.

In rejecting this argument, this Court again focused on that portion of the Act which empowered the district courts to issue such "other orders" as are necessary to enforce compliance with the Act. *Id.* at 618-19. In holding that the district court properly awarded restitution despite the fact that there was no longer any jurisdiction to issue an injunction, the Court noted that if Congress had intended to limit the Act to purely prospective relief, "it would have been unnecessary to authorize orders for other than injunctive relief since the latter remedy is wholly adequate to secure prospective compliance." *Id.* at 620.

Similarly, had Congress intended to limit the district courts to purely prospective relief under Section 7002, it would not have provided the courts with the authority to order defendants "to take such other action as may be necessary." 42 U.S.C. § 6972. As shown above, this provision plainly empowers the

district courts to award restitution in appropriate circumstances. *Supra*, pp. 8-17; *see also* U.S. Br. at 22-29. Had Congress intended only to provide relief where the nuisance existed at the time of suit, it would not have provided the courts the power to order "other action" under Section 7002(a)(1)(B). *Moore*, 340 U.S. at 620.

B. *Denying Courts the Ability to Award Restitution Where a Citizen Has Acted To Abate the Potential Hazard Prior To Filing Suit Would Frustrate Congressional Intent.*

Further, if the argument of Petitioners and the United States were accepted, the result would contravene the purposes of Section 7002. Because Sections 7002 and 7003 are intended to secure the prompt abatement of conditions which may pose a public health or environmental hazard, and because Congress intended that these sections were to serve as the codification of the common law of public nuisance, denying relief to a plaintiff who has responded to and abated the nuisance would frustrate Congressional intent.

In 1984, Congress amended Section 7003 to clarify that the section "applies to any act, whether past or present, which has resulted in or may result in an imminent and substantial endangerment to health or the environment." *See* H.R. Rep. No. 198, 98th Cong., 2d Sess., pt. I, 53 (1983) *reprinted in* 1984 U.S.C.A.A.N. 5607. In doing so, Congress also explicitly approved the Third Circuit's holding in *Price*, by stating that "Section 7003 is 'intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risks posed by toxic wastes.'" *Id.*

(quoting *Price*, 688 F.2d at 213-14). Among the types of equitable relief recognized by the *Price* court was the power to award restitution. 688 F.2d at 214.

When Congress amended Section 7003 to clarify that it covered past conduct, it also enacted into law Section 7002(a)(1)(B). *See* H.R. Rep. No. 198, 98th Cong., 2d Sess., pt. I, 53 (1983) *reprinted in* 1984 U.S.C.A.A.N. 5612. Congress stated that "this expansion of the citizens suit provision will complement, rather than conflict with, the [EPA] Administrator's efforts to eliminate threats as to the public health and the environment, particularly where the Government is unable to take action because of inadequate resources." *Id.*

It is certainly true that a citizen's rights to relief under Section 7002 are limited, and that those limitations evince the intent of Congress to place primary responsibility for supervising the response to dangerous environmental conditions on state and federal government. Thus, Section 7002 requires ninety days notice to EPA, the State, and the defendant before suit can be filed, limits the right to bring the action where government is responding to the hazard, and provides that the action cannot be brought to challenge the siting of a facility. *See, e.g.*, 42 U.S.C. §§ 6972(b)(2)(A); 6972(b)(2)(B); 6972(b)(2)(C); 6972(b)(2)(D). However, these limitations do not extend so far as to limit the power of the courts to award restitution for the costs of a successful cleanup. Plainly, none of these provisions constitutes the type of "clear and valid legislative command" that is necessary to limit a court's equitable jurisdiction. *See Porter*, 328 U.S. at 399.

Petitioners and the United States argue that these limitations, and particularly the ninety day notice requirement, reflect Congressional intent to disallow recovery where a

plaintiff successfully abates the threatened or actual endangerment prior to filing the lawsuit. *See* Pet. Br. at 19-21; U.S. Br. at 21 & n.22. According to this view, the notice requirement serves to prohibit a prospective plaintiff from recovering costs expended to eliminate the hazard until 90 days have elapsed from the time notice is given and the lawsuit is filed. Such a result is at odds with the obvious Congressional intent of encouraging prompt abatement of imminent hazards. Indeed, Section 7002 does not require notice where the complaint alleges an endangerment respecting a violation of Subchapter III of RCRA, which contains the statute's hazardous waste provisions. *See* 42 U.S.C. § 6972(b)(2)(B). This exception reflects Congress' determination that in certain circumstances "the dangers of delay and the potential for greater damage to the public health or the environment outweigh the justification for the pre-suit delay periods." *Dague v. City of Burlington*, 935 F.2d 1343, 1351 (2d Cir. 1991).

In those cases that do not fall within this exception to the notice requirement, providing notice prior to filing a claim to recover costs expended to eliminate the endangerment nonetheless satisfies the purposes of giving notice. This Court has held that one purpose for the notice requirement in the typical citizens suit provision of environmental statutes is to give the prospective defendant an opportunity to take action (such as ceasing illegal discharges) which obviates the need for litigation. *See Gwaltney*, 484 U.S. at 60. However, this is not the sole purpose of giving notice, nor the dominant one. Notice also provides the government with the opportunity to bring an action, to intervene, or simply to monitor the litigation "to assure orderly and consistent development of caselaw in this

area." *See* H.R. Rep. No. 198, 98th Cong., 2d Sess., pt. I, 53 (1983) *reprinted in* 1984 U.S.C.A.A.N. 5612. Providing notice before filing suit for restitution also satisfies the policy aims of encouraging nonjudicial resolution of disputes and of apprising the government about the claim.[13]

Read as a whole, the types of limitations placed upon a citizen's right to bring an action pursuant to Section 7002(a)(1)(B) illustrate that Congress wanted the federal government or state government to have the opportunity to respond to conditions which may present an imminent and substantial endangerment to health or the environment. However, none of the express limitations set forth in Section 7002 state that a citizen must sit idly by and wait for either the EPA, the state, or the defendant to take action. *See* 42 U.S.C. §§ 6972(b)(2)(A); 6972(b)(2)(B); 6972(b)(2)(C). In fact, in enacting Section 7002(a)(1)(B), Congress expressly recognized the very real possibility that the government may be unable to take action due to "inadequate resources." *See* H.R. Rep. No. 198, 98th Cong., 1st Sess., pt. I, 53 (1983) *reprinted in* 1984 U.S.C.C.A.N. 5612.

The Petitioners' and the United States' curious interpretation of Section 7002(a)(1)(B) does not further the intent of Congress in enacting Section 7002(a)(1)(B), and would in fact impede

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[13]Indeed, in many cases the potential RCRA citizens' suit plaintiff will not know the identity of the polluter for months or even years after the contamination is discovered. Under the views espoused by the Petitioners and the United States, a potential plaintiff should wait indefinitely to perform a cleanup or should hire detectives to find the source of the pollution so that notice can be given to the defendant before the cleanup is actually performed. *See* Pet. Br. at 19-21, U.S. Br. at 21 & n.22.

that purpose. If, as the United States argues, restitution could only be awarded if the condition which may present an imminent and substantial endangerment still existed at the moment suit was filed, it would discourage, or at least delay, voluntary cleanups of such conditions. Rather than securing the "prompt abatement of imminent and substantial endangerments," as Congress intended, citizens would be forced to wait at least ninety days (and much longer where the responsible party or parties are unknown) before taking action, or would have to take such incomplete action that the hazardous condition still existed at the time of filing. *Id.*[14] Indeed, under the view espoused by the Petitioners and the United States, a plaintiff who promptly and successfully undertakes to abate an imminent and substantial endangerment prior to filing suit would be denied compensation, whereas a plaintiff who delays responding to the hazard until after filing would be fully compensated. It strains reason to argue that this was the intent of Congress in passing Section 7002(a)(1)(B).

Allowing a citizen to take appropriate steps to abate the imminent and substantial endangerment and to later sue for restitution in no way frustrates Congressional intent, as would the Petitioners and the United States' interpretation of the

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[14]At least one court has recognized a right of contribution under Section 7003, holding that permitting a right to contribution serves the dual purpose of promoting the prompt cleanup of the site while eliminating the inequity that would result if liable parties who did not participate in the cleanup were able to avoid contributing to the costs of the cleanup. *See Valentine*, 856 F.Supp. at 635. The same purposes would be served if a citizen who abates the potentially hazardous condition is awarded restitution of the costs expended in doing so.

provision. The citizen must comply with all of the jurisdictional prerequisites set forth in Section 7002 before bringing an action, prerequisites that are clearly directed towards encouraging government action to respond to the hazardous condition. *See* 42 U.S.C. §§ 6972(b)(2)(A); 6972(b)(2)(B); 6972(b)(2)(C). Moreover, courts would obviously have wide discretion in determining *whether* restitution should be awarded in a given circumstance, an entirely different inquiry than whether the court has the *power* to award restitution.

The United States suggests that plaintiffs who successfully abate conditions that produce or threaten to produce imminent and substantial endangerments to health or the environment will still have available to them state law remedies. U.S. Br. at 18-21. To the extent that this argument has any relevance to the inquiry before this Court, its fallacy is apparent upon examination.

First, several states do not possess environmental laws which cover all of the types of contamination which are covered under Section 7002(a)(1)(B). For example, it is beyond dispute that this provision applies to spilt or leaked petroleum products. *See KFC Western*, 49 F.3d at 523, n.6 (provision applies to gasoline); *Craig Lyle Ltd. Partnership v. Land O'Lakes, Inc.*, 877 F.Supp. 476, 483 (D. Minn. 1995) (spilt or leaked petroleum is a "solid waste" under RCRA); *Paper Recycling, Inc. v. Amoco Oil Co.*, 856 F.Supp. 671, 675 (N.D. Ga. 1993)(same); *Zands v. Nelson*, 779 F.Supp. 1254, 1262 (S.D. Cal. 1991)(same). As the Ninth Circuit recognized in *KFC Western*, California's environmental statutes do not provide relief to a private party who has expended funds in responding to a hazardous condition where the cause of the

condition is petroleum contamination. *KFC Western*, 49 F.3d at 523, n.6. In addition, the environmental laws of the States of Alabama, Louisiana, New Mexico, North Dakota, South Dakota, Vermont, Virginia and Wisconsin are not broad enough to provide compensation in most circumstances where a private citizen has responded to a release of petroleum which has created a hazardous condition.

Moreover, as the United States (one of the major polluters in this country) is undoubtedly aware, state law offers no recourse against the United States, and liability under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671 *et seq.*, depends upon proof of wrongful conduct. *See Laird v. Nelms*, 406 U.S. 797 (1972); *Dalehite v. United States*, 346 U.S. 15 (1953). It is due in part to the deficiencies of common law remedies that Congress intended Sections 7002 and 7003 to be "more liberal" than their "common law counterparts." S. Rep. No. 96-172, 96th Cong., 1st Sess., at 5 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5019, 5023 (1980) (explaining purpose of Section 7003).

The deficiencies of state law as a means of recovering the costs of abating an imminent and substantial endangerment where the federal government is the defendant are illustrated in a case pending against the United States Department of Agriculture in the United States District Court for the District of Massachusetts. *See* Complaint, *Commonwealth of Massachusetts v. United States Department of Agriculture*, C.A. No. 95-11668 REK (D. Mass., filed July 27, 1995).

In that case, the Commonwealth responded to an emergency situation in 1986 in which public drinking water supplies were found to be contaminated with various carcinogenic chemicals, including benzene. *Id.* The Commonwealth took certain steps

to abate the endangerment, including providing alternate drinking water supplies to its citizens and performing an evaluation of the extent of the environmental harm. *Id.*

Some years later the Commonwealth discovered that the United States Department of Agriculture ("USDA") was a probable cause of the contamination. *Id.*

Were a private defendant involved, Massachusetts could have proceeded under its own State "Superfund" law, Mass. Gen. Laws c. 21E. *See* Mass. Gen. Laws Ann. c. 21E, § 5 (1983 & 1995 Supp.)(creating liability for parties who release oil into the environment). However, because the contamination was caused by a release of petroleum, due to the sovereign immunity of the federal government, Chapter 21E could not be used to hold the USDA liable. *See* 42 U.S.C. § 9601(14) (excluding petroleum from regulation under CERCLA); *New York v. United States*, 620 F.Supp. 374, 386 (E.D.N.Y. 1985) (no cause of action lies against federal government under CERCLA where contamination is limited to uncontaminated petroleum products). The availability of a tort suit under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671 *et seq.* would entail the daunting task of proving a waiver of sovereign immunity in the face of the discretionary function exception, and would further require a showing of negligent or intentionally wrongful conduct on the part of the United States. *See supra*, p. 28. Due to the unavailability of other options, Massachusetts chose to proceed under Section 7002(a)(1)(B).

Contrary to the assertions of the United States, a ruling which limits the powers of the federal district courts to award restitution in such actions only where the endangerment continues to exist will lead to numerous situations where a plaintiff, in many cases an innocent party who has undertaken

a cleanup of a hazardous condition, will be left without a remedy. This will be particularly likely where the polluter is the federal government and the contamination consists of leaked or spilt petroleum.

Conclusion

For the foregoing reasons, the amici states urge this Court to affirm the decision of the Ninth Circuit Court of Appeals and to rule that Section 7002 enables citizens to recover the costs they have expended in responding to environmental hazards. Such a ruling is consistent with the established precedents of this Court and promotes the intent of Congress in enacting this legislation.

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